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Supreme Court of the United States,

OCTOBER TERM, 1907.

CLARENCE H. VENNER,
Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY and JAMES J. HILL,
Appellees.

No. 485.

BRIEF FOR APPELLEES.

This is an appeal from the Circuit Court of the United States for the Southern District of New York directly to the Supreme Court, under the first subdivision of Section 5 of the Act of March 3, 1891, and the only question before the Court is whether said Circuit Court had jurisdiction of the cause, or should have remanded it to the State court.

The complainant is a citizen of the State of New York. The defendant, Great Northern Railroad Company, is a corporation organized and existing under the laws of the State of Minnesota, and the the defendant, James J. Hill, is a citizen of the State of Minnesota.

The action was originally begun in the New York Supreme Court by service of summons and com-

plaint on both defendants. Before issue was joined in the State court, the defendants joined in a petition and bond for the removal of the suit to the Circuit Court, on the ground of diversity of citizenship. Thereafter defendants joined in a motion to compel complainant to replead according to the forms and practice in equity. This motion was granted October 25, 1906, and a new bill of complaint was filed November 9, 1906. To the latter both defendants demurred. These demurrers were set down for argument for the April Term, and were argued on the 30th of April, 1907. After they were so set down for argument complainant moved to remand the cause to the State court, on the ground that the action did not involve a controversy between citizens of different States. This motion was denied, and subsequently the demurrers were sustained, with leave to complainant to amend, and on his failure to amend final judgment dismissing the bill of complaint was entered.

Complainant brought his action as a stockholder of the Great Northern Railroad Company against that company and James J. Hill. He alleges that the defendant Hill, while president of and controlling said company and its Board of Directors, improperly caused said company to purchase certain securities from him or in which he was interested, whereby he made a large, illegal, personal profit; that complainant made a demand upon said company, its directors and said Hill as its president, that this or similar action be brought by the said company against said Hill, but said demand was refused. It is alleged, both in the original complaint and in the amended bill in the Circuit Court, *that at all times mentioned in the complaint* said Hill was a director and president of the defendant corporation, and dominated and controlled it and its Board of Directors; and that the Board of Directors of said company were employees of said company, and subservient to the wishes of said Hill in the discharge of their duties as directors of said cor-

poration (see pp. 2 and 14 of the record). Complainant does not state when he became a stockholder.

From the allegations of the complaint in the State court it appears, although not so specifically alleged, that the amount in controversy exceeds $2,000 (p. 4). In the petition for removal (p. 7) and in the amended bill of complaint (p. 14 of the record) it appears that the amount in controversy exceeds $2,000, exclusive of interest and costs. No question is raised as to the time of removal, the amount involved, the bond on removal or the petition of removal. The only question therefore, that is presented, and the only question certified to this Court (p. 51), is whether or not the case involved a controversy between citizens of different States.

Appellees contended (1) that the only question for review is whether the Circuit Court had jurisdiction of the cause; and (2) that such jurisdiction existed because there was a real controversy between citizens of different States, both defendants being antagonistic to complainant, and the corporation defendant being controlled by the individual defendant.

POINT I.

The only question for review is whether the Circuit Court had jurisdiction.

Usually parties regard it as of advantage to argue a cause orally so that the Court may ask questions and full light may be thrown on the subject before it; but in the case at bar it seems quite clear that appellant did not wish this because it is certain that he would not be permitted to occupy the time of the Court with the discussion of a multitude of subjects which are not before it for review. By making a

long brief and specious reasoning he has attempted to complicate a very simple issue, and, by presenting arguments which are novel only in the sense that few people would have the temerity to offer them to this Honorable Court, he has apparently cherished the hope of "catching" some of its members. To be sure, this is scarcely complimentary to the Court's intelligence, but it is difficult to otherwise explain his brief. To the larger part of this brief no reply will be made. We shall not discuss his proposition that only good causes of action may be removed to the Circuit Court from the State court. Its statement is quite a sufficient answer. Nor shall we occupy time in speculating what Congress would have done if it had known the construction the courts have put for two generations on certain Federal statutes; nor in pointing out inconsistencies in the various parts of his brief; nor in arguing whether the Circuit Court decided the demurrers correctly, but we shall devote ourselves solely to the question of whether the case presented a controversy between citizens of different States.

Inasmuch as this appeal is taken direct from the Circuit Court to this Court, and the question of the former Court's jurisdiction is certified up, this Court can consider only whether the Circuit Court as a Federal court had jurisdiction, and not whether as a court of equity it should have sustained or overruled the demurrers. In other words, the substantive law applicable to the disposal of the demurrers is not before this Court for review, but is waived, and the only question for review is whether there was a diversity of citizenship between the parties, as that was the ground of jurisdiction.

Chicago *v.* Mills, 204 U. S., 321, 326.

Louisville Trust Co. *v.* Knott, 191 U. S., 225, 233-4.

Hennessy *v.* Richardson Drug Co., 189 U. S., 25, 33.

Mexican Central R. R. Co. *v.* Eckman, 187 U. S., 429, 432.

Blythe *v.* Hinckley, 173 U. S., 501.
U. S. *v.* Rider, 163 U. S., 132, 139.
Smith *v.* McKay, 161 U. S., 355.
U. S. *v.* Jahn, 155 U. S., 109, 113.
Schunck *v.* Moline, 147 U. S., 500, 507.
McLish *v.* Roff, 141 U. S., 661.
Rosenbaum *v.* Bauer, 120 U. S., 459.

POINT II.

The Circuit Court had jurisdiction.

The right to remove the case from the State court depended upon whether the action was of a civil nature at law or in equity, and involved a controversy between citizens of different States. We do not understand that appellant disputes, or could dispute, that he is a citizen and resident of New York (pp. 7, 13), or that defendant, Great Northern Railway Company was and is a corporation organized under the laws of Minnesota (pp. 1, 7, 13), and thus a citizen of Minnesota.

Barrow Steamship Co. *v.* Kane, 170 U. S., 100, 106.
B. & O. R. R. Co. *v.* Koontz, 104 U. S., 5, 12;

or that defendant Hill was and is a citizen of Minnesota (pp. 7, 14), or that the amount in dispute exceeded, exclusive of interest and costs, the sum of $2,000 (pp. 4, 7, 17), or that the action is of a civil nature at law or in equity.

The only question that is open for discussion therefore is whether the case involves a controversy between citizens of different States. As the parties are arranged the citizenship of plaintiff is different from that of the defendants. However, he asserts that the Great Northern R. R. should be aligned with him, because his action is of a representative char-

acter and for its benefit. The mere fact, however, that the defendant corporation might be benefitted by such a suit does not force its alignment with complainant, unless there is really no controversy between the complainant and the Railroad Company; that is, unless the corporation, finding that it had a cause of action against the defendant Hill, procured complainant to bring the suit, and its refusal to maintain it was not real but simulated for the purpose of giving this Court jurisdiction.

Many of the arguments and cases presented here by appellant were laid before this Court by his counsel in the case of Doctor *v.* Harrington, 196 U. S., 579, but without avail. In that case, as in the one at bar, the complainant brought suit against a corporation in which he was a stockholder, and the other defendants, who were alleged to be in control of said corporation and to have manipulated its affairs to their personal advantage. There, as here, it was contended that the corporation should be aligned with complainant.

One of the contentions of counsel that the Court had not jurisdiction is stated by the Court as follows:

> (p. 585.) "Granting that the complainants are citizens of New Jersey, yet as they are suing for the Sol Sayles Company, a New York corporation, that corporation, although in form a defendant, is in legal effect on the same side of the controversy as the complainants, and since it is a citizen of the same State as the other defendants, the Circuit Court had no jurisdiction, as the suit does not involve a controversy between citizens of different States."

As a reply to this contention the Court says, page 587:

> "2. The ninety-fourth rule in equity contemplates that there may be and provides for a suit brought by a stockholder in a corporation founded on rights which may properly be

asserted by the corporation. And the decisions of this Court establish that such a suit, when between citizens of different States, involves a controversy cognizable in a Circuit Court of the United States. The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests and the interests of the corporation may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court.

"In *Detroit* v. *Dean*, 106 U. S., 537, Dean, who was a citizen of New York and a stockholder in the Mutual Gas Light Company, a Michigan corporation, in order to protect its right and property against the threatened action of a third party brought suit against the latter and the corporation in the Circuit Court of the United States for the Eastern District of Michigan. This Court ordered the bill dismissed, not because Dean and the corporation had identical interests, but because the refusal of the directors of the corporation to sue was collusive. The right of a stockholder to sue a corporation for the protection of his rights was recognized, the condition only being the refusal of the directors to act, which refusal, it is said, must be real, not feigned. *Hawes* v. *Oakland*, 104 U. S., 450, was cited, where a like right was decided to exist. See also *Dodge* v. *Woolsey*, 18 How., 331; *Davenport* v. *Dows*, 18 Wall., 626; *Memphis* v. *Dean*, 8 Wall., 64; *Greenwood* v. *Freight Company*, 105 U. S., 13; *Quincy* v. *Steel*, 120 U. S., 241. It was said in *Dodge* v. *Woolsey* that the refusal of the directors to sue caused them and Woolsey, who was a stockholder in a corporation of which they were directors, 'to occupy antagonistic grounds in respect to the controversy, which their refusal to sue forced him to take in defense of his rights.' *Dodge* v. *Woolsey* was modified by *Hawes* v. *Oakland*,

> as to what circumstances would justify a suit by a stockholder if the directors refuse to sue. See also *Quincy* v. *Steel, supra.*"

Said case of Doctor *v.* Harrington is conclusive of the case at bar, for in that case, as in this, the complainant bases his right to maintain the action on the ground that the defendant-corporation is controlled by its co-defendant, who, it is alleged, used the corporation for his own advantage. In the case at bar it is alleged that the corporation, being in control of the defendant Hill, has refused to maintain an action against said Hill to recover the profits it is alleged he has made on transactions with it. Consequently, the defendant-corporation cannot be aligned with the complainant in determining whether the Circuit Court had jurisdiction.

To the same effect is New Jersey Central Railroad Company *v.* Mills, 113 U. S., 249. In that case it was contended that the corporation for whose benefit the suit was brought should, for jurisdictional purposes, be removed from its position as defendant to the side of the plaintiff, but to that contention the Court said (p. 256):

> "The New Jersey corporation is in no sense a merely formal party to the suit, or a party in the same interest with the plaintiffs; but is rightly and necessarily made a defendant."

See also East Tennessee, &c., R. R. Co. *v.* Grayson, 119 U. S., 240, where the Court, for the purpose of determining the jurisdictional question, refused to align the corporation with its complaining stockholder in an action brought in the interest of the corporation, saying, on pages 243 to 244:

> "* * * Under these circumstances it is clear that the Memphis and Charleston Company is not a mere formal party, or a party in the same interest with Grayson, but is rightly and necessarily a defendant. * * * It is true a decree in his favor may be for the advantage of the Memphis and Charleston

> Company but he does not represent the Company in its corporate capacity and has no authority to do so. As a stockholder he seeks protection from the illegal acts of his own Company as well as the other. According to the allegations of the bill it may fairly be inferred that a majority of the stockholders of the Memphis and Charleston Company have combined with the East Tennessee, Virginia and Georgia Company (the other defendant) to sacrifice the rights of the minority, and this suit is in behalf of the minority to protect themselves against this unlawful and fraudulent combination. Left to themselves, the two companies will settle on a basis that will be ruinous to the interests of Grayson and those in like situation with himself. This he seeks to prevent."

So in the case at bar, the substance of the complaint is that, if the defendants be left to themselves, Mr. Hill being in control of the corporation and its directors, no action will be brought against him to recover the alleged illegal profits, and that as a matter of fact the railroad company under the control of Mr. Hill has refused to bring the suit.

Again, Chicago *v.* Mills, 204 U. S., 321, was an action by Mills, a stockholder in the Peoples' Gas, Light & Coke Company, against it and the City of Chicago to restrain the City from enforcing a certain ordinance. The company at first refused to bring the action, but in the trial joined in complainant's contention. Objection was made to the jurisdiction on the ground that there was fraudulent collusion between Mills and his corporation to give the Court jurisdiction of a cause of which it would not have jurisdiction if the corporation had brought the suit. The Court found that there was no such collusion and therefore sustained the jurisdiction.

The case at bar therefore resolves itself into an inquiry whether there was a collusion between the parties to create a cause of which the Federal courts would have jurisdiction.

Hawes *v.* Oakland, 104 U. S., 450, p. 452:

From that case it appears that after Dodge *v.* Woolsey was decided, corporations, by the device of getting a stockholder to bring an action which they really desired to bring but made a feigned refusal to bring, endeavored to bring most of their litigation in Federal courts, when, in reality, had such actions been brought by the corporation there would be no diverse citizenship, the Court saying:

> "A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery; namely, one against his own company, of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court."

The suggestion of any such collusion in the case at bar is unthinkable. It is inconceivable that the defendant Hill, being in control of the defendant The Great Northern Railroad Company, discovering that the latter has a cause of action against himself for fraud, and wishing that action pursued, called into consultation the complainant, asked him to bring the suit for the benefit of the corporation, and

had the corporation only *feign* its refusal to bring the suit. It is more conceivable that if Mr. Hill wished such an action to be brought he would have had the corporation bring it, and, being in control thereof, he would have merely a feigned trial. As a defendant guilty of fraud he could not be expected to do justice in prosecuting himself. Therefore a court of equity, even if the corporation had started the suit, would have permitted the plaintiff to bring one for its benefit on the ground that his rights, if any, could not otherwise be properly protected.

We have searched in vain for any suggestion in appellant's brief that he was in collusion with the defendants to create a case of which the Court would have jurisdiction. The acts of the parties and the allegations of the bill contradict any such suggestion. Plaintiff brought his suit in the State court; the two defendants joined in a petition for its removal, and they have consistently denied in the Federal Court his right to maintain the action and have opposed him at every step. Indeed at the time of the argument of the motion to remand, defendants' counsel stated that the only question before the Court was whether there was collusion to give it jurisdiction, and challenged complainant to state that there was such collusion. This he openly refused to do, and he could not do so without making himself ridiculous in view of the following allegation, which is repeated, either *in hæc verba* or in substance, over and over again in the original and in the supplemental bill (p. 2):

> "6. That at all of the times hereinafter stated, the defendant, James J. Hill, was a director and president of the defendant, Great Northern Railway Company, and dominated and controlled the said corporation defendant, and the Board of Directors thereof; and that at all of said times a great majority of the Board of Directors of said corporation defendant were employes of said corporation defendant and were subservient to the wishes of the

defendant James J. Hill, in the discharge of their duties, as directors of the said corporation defendant."

"9," p. 3.
"10," p. 4.
"11," p. 4.
"Fifth," p. 14.
"Sixth," p. 14.
"Eighth," p. 15.
"Ninth," p. 16.

In the light of these allegations it is inconceivable that there was any collusion between the complainant and Mr. Hill, which statement would also exclude any collusion between complainant and the defendant corporation, which, as alleged, is controlled by Mr. Hill.

Appellant makes the further point that the Court did not have jurisdiction because he does not allege, in accordance with Equity Rule 94, that there was no collusion. He treats Rule 94 as if it affected the jurisdiction of the Circuit Court. It does not require argument that the Federal courts are created by the United States Constitution and Acts of Congress, and that by rules of court the jurisdiction thereof can neither be increased nor diminished. Such rules can only regulate practice.

Defendants below obtained an order requiring the complainant to replead according to the rules and practice in equity (p. 13). They could do no more. They could not force complainant to make this allegation in accordance with said rule, and it is certainly an extraordinary doctrine for a party to urge his refusal to comply with the order of Court and the rules of practice as a reason for remanding a cause. Parties cannot agree to give the Court jurisdiction, nor can a party at his will take away from the Court jurisdiction of a cause.

Wecker *v.* National Enameling Co., 204 U. S., 176.

Whether the Court has jurisdiction is not dependent upon allegations that there was no collusion, but

upon the fact that the cause presented a controversy between citizens of different States and that more than two thousand dollars, exclusive of interest and costs, was involved therein. These facts having been established as aforesaid the jurisdiction is sustained.

Complainant, as a matter of fact, purchased his stock just before bringing suit and between five and six years after the alleged facts of which he complained, and he could not, and did not, allege that he was a stockholder at the time of their occurrence. Under Hawes *v.* Oakland, and numerous decisions in point since that case was decided, and under the 94th Rule of Equity, complainant cannot maintain the action. This defect of title did not, as appellant argues, create any Federal jurisdictional question.

Corbus *v.* Gold Mining Co., 187 U. S., 455.

Illinois Central R. R. Co., *v.* Adams, 180 U. S., 28, 34-5.

POINT III.

The judgment should be affirmed.

Respectfully submitted,

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Of Counsel.